SERVICE DATE - JULY 26, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34013

B. WILLIS, C.P.A., INC. —
PETITION FOR DECLARATORY ORDER

Decided: July 23, 2002

This decision addresses the petition of B. Willis, C.P.A., Inc. (B. Willis or Petitioner), filed June 21, 2002, to reopen the decision served October 3, 2001 in this proceeding.[1] Petitioner states that its request is based on new evidence that demands a different result. However, the evidence Petitioner brings is not new evidence that was previously unavailable to it, nor does that evidence lead us to any different conclusion. Accordingly, Petitioner's request to reopen this administratively final decision will be denied.

BACKGROUND

1. Board Licensing in General. Before a person may construct or operate a new or extended rail line, it generally must obtain authorization from the Board. 49 U.S.C. 10901. There are, however, exceptions. Under 49 U.S.C. 10906, no Board authorization is required for construction or operation

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[1] That decision was issued by the Director of the Office of Proceedings, to whom responsibility for deciding whether to institute a declaratory order proceeding has been delegated. 49 CFR 1011.8(c)(6).

of spur, industrial, team, switching, or side tracks (so-called "auxiliary tracks").[2] And, as discussed below and in our October 2001 decision, the Board has no jurisdiction over private track — track that is used exclusively by the track's owner for movement of its own goods (either by utilizing its own equipment or by contracting for service) and for which there is no common carrier obligation to serve other shippers that might locate along the line.

2. This Case. In February 2001, B. Willis filed a petition seeking a Board declaration that the Public Service Company of Oklahoma d/b/a American Electric Power Company (PSO) was required to obtain prior authorization from our predecessor, the Interstate Commerce Commission (ICC),[3] to construct and operate approximately 10 miles of rail track in Oklahoma that was built in 1994-95. That track connects PSO's Northeastern Generating Station, an electric power generating facility located at Oologah, Oklahoma (the power plant), with the main line of The Burlington Northern and Santa Fe Railway Company (BNSF). Prior to construction of the new track, the power plant could receive rail service at the power plant only from the Union Pacific Railroad Company (UP).

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[2] The Board has jurisdiction over auxiliary tracks, which are part of the common carrier (i.e., regulated) rail network, but a Board license is not required to construct or operate them because of the 10906 exception. Thus, track classified as spur, industrial or side track has a regulatory status that private track does not share. See United Transp. Union v. STB, 183 F.3d 606, 612 (7th Cir. 1999).

[3] In the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), Congress abolished the ICC, revised the Interstate Commerce Act, and transferred remaining rail regulatory responsibilities to the Board, effective January 1, 1996.

PSO had the track constructed for the sole purpose of providing the power plant with access to a second rail carrier. The rail track was constructed at PSO's expense, and PSO owns the track and pays the costs associated with its maintenance. Rail operations over the track, supplying trainloads of coal to the power plant, commenced in March 1995. The rail operations are conducted by BNSF under contract with PSO. BNSF uses the track pursuant to a license from PSO.

There are no other shippers located on the line, and neither PSO nor BNSF holds out the possibility for any other shipper(s) to obtain service over the line. To the contrary, BNSF's contractual agreement with PSO for use of the track does not permit service to any entity other than PSO's power plant, either now or in the future. Based on these facts that were on the record before us, our October 2001 decision determined that the track is private track, which falls outside the reach of the Board's statutory jurisdiction, and that prior agency authorization or approval was not required for its construction or operation.

Part of the track was built across a parcel of land owned by B. Willis. PSO exercised its power of eminent domain as an electric generating company pursuant to Oklahoma state law after it failed to reach agreement with B. Willis to purchase a right-of-way easement across a corner of B. Willis' property.[4] B. Willis continues to object to the taking and has sought judicial review of our October 2001 decision in the United States Court of Appeals for the District of

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[4] The condemnation action was filed by PSO in October 1992. PSO took possession of the easement in March 1994 and thereafter had the track constructed.

Columbia Circuit.[5]

On June 21, 2002 — shortly before its opening brief was due to be filed in court — B. Willis filed a petition to reopen this administratively final action pursuant to 49 CFR 1115.4, asserting "a need to introduce new evidence that shows that there was material error in the Board's prior decision."[6] The purported new evidence consists of copies of the following documents issued between 1993 and 2000: (1) the Oklahoma Official State Railroad Map; (2) a diagram of PSO's track indicating 6 crossings of public roads; and (3) a letter from an Oklahoma Department of Transportation (ODOT) official to the Federal Railroad Administration (FRA) reporting the assignment of 12 crossing inventory numbers[7] related to PSO's track.

On June 27, 2002, PSO and BNSF filed a joint reply. They oppose reopening, on the grounds that the proffered evidence is not new; that B. Willis has not explained why this evidence was not submitted to the Board previously; that the evidence is merely cumulative; and that it would not affect the outcome. PSO and BNSF emphasize that the petition to reopen simply reiterates arguments B. Willis had already

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5 B. Willis, C.P.A., Inc. v. STB and USA, No. 01-1441 (D.C. Cir. filed Oct. 9, 2001).

6 Petition to reopen at 1.

7 The National Highway-Rail Crossing Inventory is maintained by the United States Department of Transportation (U.S. DOT) with the cooperation of state departments of transportation and the Association of American Railroads (AAR). The national crossing inventory consists of a uniform national numbering system in which a unique designation, consisting of a 6-digit number followed by a letter, is assigned to every highway-rail crossing in the nation.

made.

DISCUSSION AND CONCLUSION

Under our Rules of Practice, a petitioner seeking to reopen an administratively final decision must "state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances." 49 CFR 1115.4. Where new evidence is involved, that evidence "must not appear to be cumulative, and an explanation must be given why it was not previously adduced." 49 CFR 1115.3(c). B. Willis has not satisfied these criteria.

The limitations in our rules against the introduction of new evidence reflect the need for finality in the administrative process. A party should not withhold evidence it considers to be relevant until after it has obtained a result not to its liking, and then seek to have the proceeding reopened so that it may introduce that evidence.[8] The evidence B. Willis now seeks to introduce was all clearly available at the time it filed its petition at the Board in February 2001. The Oklahoma Official State Railroad Map has been available since 2000; the diagram of PSO's track apparently dates from 1993;[9] and the ODOT letter to FRA

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[8] See, e.g., S.R. Investors, Ltd., Doing Business as Sierra Railroad Company — Abandonment — In Tuolumne County, CA, Docket No. AB-239X (I.C.C. Served Jan. 26, 1988), slip op. at 7, aff'd sub nom. Friends of Sierra R.R., Inc. v. ICC, 881 F.2d 663 (9th Cir. 1989).

[9] See PSO/BNSF joint reply at page 3, note 1: "The date on [the track diagram] is illegible, however, it is believed that it was created in 1993."

dates from August 1995.[10] B. Willis asserts that it did not submit these materials earlier because it could not have known that PSO would claim not to be a common carrier (or that the Board would agree). As PSO has asserted its noncarrier status for years, B. Willis' claim is not credible. In short, Petitioner has not satisfactorily explained why it did not submit this evidence until now.

In any event, the newly proffered evidence does not in any way undermine the October 2001 decision. While PSO's track is shown on the Oklahoma Official State Railroad Map, the State of Oklahoma issues its railroad maps solely for informational purposes. Inclusion of a particular piece of track on the Oklahoma Official State Railroad Map indicates the track's existence and location within Oklahoma's borders, but does not convey any judgment as to whether particular track is for common carrier freight service or not, and thus is not determinative of whether that track is subject to our jurisdiction under the revised Interstate Commerce Act (ICA), at 49 U.S.C. Subtitle IV. PSO and BNSF attached to their joint reply a copy of an April 2001 letter from Mr. John E. Dougherty, Branch Manager of the Rail Programs Division of ODOT, to an attorney representing PSO, who had inquired regarding what tracks are included on the Oklahoma Official State Railroad Map.[11] The ODOT official explained: "On our map, we include trackage to power stations, such as Public Service Company of Oklahoma and Western Farmers

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[10] B. Willis also attached as an exhibit a copy of a 1992 letter from a PSO employee (written long before the track was constructed) that B. Willis construes as an admission by PSO that it is a common carrier. But that letter — which provides no basis on which to conclude that PSO holds out freight service to the general public — had already been submitted to the Board earlier in this proceeding.

[11] PSO/BNSF joint reply, Exhibit 4.

Electric Co-op. These two track designations were just recently added to our 1998 and 2000 maps to identify location only." Another letter from ODOT's Mr. Dougherty further explains: "ODOT does not have statutory authority to regulate railroad companies or their operations. ODOT also does not make any determination as to rail operators' status as common carriers or actual ownership."[12] Thus, inclusion of track on the Oklahoma map does not reflect any opinion on the part of ODOT as to common carrier status.[13]

Similarly, the diagram of PSO's track, indicating that it crosses several roads, is not relevant to our determination that this track is private track. Any track approximately 10 miles in length is bound to cross a few public roads or highways, even in a remote rural area such as this. Crossing public roads where necessary does not turn otherwise private track into a regulated rail line. B. Willis' petition to reopen cites various authority for the proposition that common carrier railroads are allowed to cross state roads, and asserts that this somehow proves that private rail track cannot do so.[14] But that conclusion — which assumes the point it is attempting to prove — is neither logical nor correct. There are many situations in which private track crosses public highways, and the mere existence of such crossings does not provide a basis for bringing such track under our regulatory jurisdiction.

Finally, the 1995 ODOT letter to FRA, indicating that

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[12] Id., Exhibit 5.

[13] Indeed, the highlights of the text accompanying the Oklahoma rail map focus not on rail freight service, but on the resumption of Amtrak passenger service in Oklahoma in 1999 after an absence of nearly 20 years.

[14] Petition to reopen at 7-8.

PSO's crossings are included in the national highway-rail grade crossing inventory, is likewise not indicative of common carrier status. That national inventory assigns to every U.S. highway-rail grade crossing a unique numeric identifier, so that data about all crossing incidents and accidents in the country — not just those involving common carrier railroads — can be accurately collected, tabulated and analyzed. The U.S. DOT utilizes broad definitions to specify which crossings should obtain crossing inventory numbers and report accidents and incidents at those crossings to the FRA. "*Highway-rail grade crossing* means a location where a public highway, road, street, or private roadway, including associated sidewalks and pathways, crosses one or more railroad tracks at grade." 49 CFR 225.5. "*Railroad transportation* means any form of non-highway ground transportation that runs on rails or electro-magnetic guideways, including commuter or other short-haul railroad passenger service in a metropolitan or suburban area. . . without regard to whether they use new technologies not associated with traditional railroads." Id. These broad definitions capture all crossings of roads or highways by tracks of any kind, whether tracks of a common carrier freight railroad, tracks of a passenger or commuter operation, or private rail tracks. Assignment of crossing inventory identifier numbers is thus simply not relevant to our determination under the ICA of whether or not track constitutes a common carriage rail line.

On the basis of the purportedly new evidence, B. Willis reiterates arguments already made on the record and already considered in reaching the October 2001 decision. But these arguments are no more persuasive than they were when first presented. A person is not a rail carrier for purposes of the ICA unless it holds itself out to provide rail service to others. See 49 U.S.C. 10102(5) ("'rail carrier' means a person

providing common carrier railroad transportation for compensation"); 49 U.S.C. 10501(a)(1) ("the Board has jurisdiction over transportation by rail carrier").[15] Thus, as the October 2001 decision correctly concluded (at 4), where, as here, "a shipper does not hold out to provide common carrier railroad service over a line it constructs and maintains to serve its own facility, and no other shippers are served by the line, then neither that construction, nor a railroad's operation over that track to reach the shipper's facility, requires ICC or Board authorization or approval."

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The petition to reopen is denied.

2. This action is effective on its date of service.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams
Secretary

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[15] B. Willis seeks a broader reading of our jurisdiction based upon the language of 49 U.S.C. 10102(6) ("'railroad' includes. . . the road used by a rail carrier and owned by it or operated under an agreement"), but that section must be read in conjunction with sections 10102(5) and 10501(a)(1).

49 U.S.C. §10102(2002)
§ 10102. Definitions

In this part--
(1) "Board" means the Surface Transportation Board;
(2) "car service" includes (A) the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, other vehicles, and special types of equipment used in the transportation of property by a rail carrier, and (B) the supply of trains by a rail carrier;
(3) "control", when referring to a relationship between persons, includes actual control, legal control, and the power to exercise control, through or by (A) common directors, officers, stockholders, a voting trust, or a holding or investment company, or (B) any other means;
(4) "person", in addition to its meaning under section 1 of title 1, includes a trustee, receiver, assignee, or personal representative of a person;
(5) "rail carrier" means a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation;
(6) "railroad" includes--
(A) a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad;
(B) the road used by a rail carrier and owned by it or operated under an agreement; and
(C) a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation;
(7) "rate" means a rate or charge for transportation;
(8) "State" means a State of the United States and the District of Columbia;
(9) "transportation" includes--
(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier,

dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property; and

(10) "United States" means the States of the United States and the District of Columbia.

49 U.S.C. §10501(2002)
§ 10501. General jurisdiction

(a)(1) Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is--
(A) only by railroad; or
(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.
(2) Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in--
(A) a State and a place in the same or another State as part of the interstate rail network;
(B) a State and a place in a territory or possession of the United States;
(C) a territory or possession of the United States and a place in another such territory or possession;
(D) a territory or possession of the United States and another place in the same territory or possession;
(E) the United States and another place in the United States through a foreign country; or
(F) the United States and a place in a foreign country.
(b) The jurisdiction of the Board over--
(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,
is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies

provided under Federal or State law.

(c)(1) In this subsection--

(A) the term "local governmental authority"--

(i) has the same meaning given that term by section 5302(a) of this title; and

(ii) includes a person or entity that contracts with the local governmental authority to provide transportation services; and

(B) the term "mass transportation" means transportation services described in section 5302(a) of this title that are provided by rail.

(2) Except as provided in paragraph (3), the Board does not have jurisdiction under this part over mass transportation provided by a local governmental authority.

(3)(A) Notwithstanding paragraph (2) of this subsection, a local governmental authority, described in paragraph (2), is subject to applicable laws of the United States related to--

(i) safety;

(ii) the representation of employees for collective bargaining; and

(iii) employment, retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers.

(B) The Board has jurisdiction under sections 11102 and 11103 of this title over transportation provided by a local governmental authority only if the Board finds that such governmental authority meets all of the standards and requirements for being a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission that were in effect immediately before January 1, 1996. The enactment of the ICC Termination Act of 1995 shall neither expand nor contract coverage of employees and employers by the Railway Labor Act, the Railroad Retirement Act of 1974, the Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act.

49 U.S.C. §10901(2002)

§ 10901. Authorizing construction and operation of railroad lines

(a) A person may--
(1) construct an extension to any of its railroad lines;
(2) construct an additional railroad line;
(3) provide transportation over, or by means of, an extended or additional railroad line; or
(4) in the case of a person other than a rail carrier, acquire a railroad line or acquire or operate an extended or additional railroad line, only if the Board issues a certificate authorizing such activity under subsection (c).
(b) A proceeding to grant authority under subsection (a) of this section begins when an application is filed. On receiving the application, the Board shall give reasonable public notice, including notice to the Governor of any affected State, of the beginning of such proceeding.
(c) The Board shall issue a certificate authorizing activities for which such authority is requested in an application filed under subsection (b) unless the Board finds that such activities are inconsistent with the public convenience and necessity. Such certificate may approve the application as-filed, or with modifications, and may require compliance with conditions (other than labor protection conditions) the Board finds necessary in the public interest.
(d)(1) When a certificate has been issued by the Board under this section authorizing the construction or extension of a railroad line, no other rail carrier may block any construction or extension authorized by such certificate by refusing to permit the carrier to cross its property if--
(A) the construction does not unreasonably interfere with the operation of the crossed line;
(B) the operation does not materially interfere with the operation of the crossed line; and

(C) the owner of the crossing line compensates the owner of the crossed line.

(2) If the parties are unable to agree on the terms of operation or the amount of payment for purposes of paragraph (1) of this subsection, either party may submit the matters in dispute to the Board for determination. The Board shall make a determination under this paragraph within 120 days after the dispute is submitted for determination.

49 U.S.C. §10906

§ 10906. Exception

Notwithstanding section 10901 and subchapter II of chapter 113 of this title, and without the approval of the Board, a rail carrier providing transportation subject to the jurisdiction of the Board under this part may enter into arrangements for the joint ownership or joint use of spur, industrial, team, switching, or side tracks. The Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.

D.C. Circuit Rule 34
Rule 34. Oral Argument

(a) Substance and Style of Oral Argument. Oral argument should undertake to emphasize and clarify the written argument appearing in the briefs. This court will not entertain any oral argument that is read from a prepared text.
(b) Time Allowed for Argument. Counsel will be afforded such time for oral argument as the court may provide and will be so advised by order. Requests for enlargement of time may be made by motion filed reasonably in advance of the date fixed for the argument.
(c) Notice by Counsel. No less than 5 days before the date of scheduled argument, the court must be notified of the names of counsel who will argue. Not more than 2 counsel may be heard for each side except by leave of the court, granted on motion for good cause shown. Such requests are not favored. In cases in which 15 minutes or less per side is allotted for argument, only one counsel may be heard for each side except by leave of the court, granted on motion for good cause shown.
(d) Apportionment of Time Among Parties. In the absence of an order of this court, and subject to the provision as to number of counsel stated in paragraph (c), counsel for the parties on each side of a case, including counsel for any intervenor, may agree on the apportionment of the time allotted. In the event of a failure to agree, the court will allocate the time upon motion duly filed and served. Unless otherwise ordered, counsel for an intervenor will be permitted to argue only to the extent that counsel for the party whose side the intervenor supports is willing to share allotted time.
(e) Participation in Oral Argument by Amici Curiae. An amicus curiae, other than one appointed by the court, will not be permitted to participate in the oral argument without leave of the court granted for extraordinary reasons on motion,

except that counsel for the party supported by amicus curiae may consent to such participation subject to the provision as to number of counsel stated in paragraph (c) above. A motion by amicus curiae seeking leave to participate in oral argument must be filed at least 14 days prior to the date oral argument is scheduled.

(f) Failure to File Brief. A party who fails to file a brief will not be heard at the time of oral argument except by permission of the court.

(g) Continuance of Oral Argument. When a case has been set for oral argument, it may not be continued by stipulation of the parties, but only by order of the court upon a motion evidencing extraordinary cause for a continuance.

(h) Consolidation. Where 2 or more cases are consolidated under FRAP 3(b) or for other reason by this court, the consolidated cases will be considered as one case for the purpose of this rule unless the court directs otherwise.

(i) Exhibits and Handouts. If counsel intends to use exhibits during argument or to hand out prepared materials, notice of this intent must be provided to the court and all other counsel presenting argument by letter received not less than 5 days before the date of the argument. The letter must set forth justification for the use of the exhibits or handouts.

(j) Disposition Without Oral Argument.

(1) Procedure. Whenever the court, on its own motion, or on the motion of a party or stipulation of the parties, concludes that oral argument is not needed, the court may, after causing notice of that determination to be given to the parties by the clerk, proceed to dispose of the case without oral argument.

(2) Reconsideration. Motions for reconsideration of a decision to dispose of a case without oral argument may be made within 10 calendar days of the date of the order advising counsel of this court's determination that the case is to be decided without oral argument. Such motions are disfavored.

Okla. Stat. Ann. tit. 66 §53 (West 2003)
§ 53. Taking by eminent domain--Commissioners--Appointment and proceedings-- Right to construct road

A. If the owner of any real property or interest therein, over which any railroad corporation, incorporated under the laws of this state, may desire to locate its road, shall refuse to grant the right-of-way through and over his premises, the district judge of the county in which said real property may be situated shall, upon the application or petition of either party, and after ten (10) days' notice to the opposite party, direct the sheriff of said county to summon three disinterested freeholders, to be selected by said judge as commissioners, and who shall not be interested in a like question.
B. The condemnor shall give notice to a condemnee by personal service or by leaving a copy of the notice at the condemnee's place of residence with some member of his family over fifteen (15) years of age, or by publication in the case of a condemnee who resides out of this state or a resident of this state who has departed herefrom with intent to avoid service of notice, or whose whereabouts or identity the condemnor, or his attorney, upon diligent inquiry is unable to ascertain, or an unknown heir, successor or assign of one in whom some right, title or interest in the property concerned was possessed, by publishing such notice once a week for two (2) consecutive weeks in a newspaper authorized by law to publish legal notices in the county where the petition is filed, the ten-day period to begin with the first publication. A copy of such notice and a copy of the petition shall be mailed to such opposite party's last-known mailing address within five (5) days of the first publication thereof. The procedure for service by publication as authorized herein shall in all other respects be as provided by law for service by publication in civil actions, except summons need not first be issued.

C. The commissioners shall be sworn to perform their duties impartially and justly; and they shall inspect said real property and consider the injury which said owner may sustain by reason of the condemnation and they shall assess the just compensation to which said owner is entitled; and they shall forthwith make report in writing to the clerk of the court, setting forth the quantity, boundaries, and just compensation for the property taken, and amount of injury done to the property, either directly or indirectly, which they assess to the owner; which report must be filed and recorded by the clerk. A certified copy of the report may be transmitted to the county clerk of the county where the land lies, to be by him filed and recorded, without further acknowledgment or proof, in the manner and with like force and effect as is provided for the recording of deeds. And if said corporation shall, at any time before it enters upon said real property for the purpose of constructing said road, pay to said clerk for the use of said owner the sum so assessed and reported to him as aforesaid, it shall thereby be authorized to construct and maintain its road over and across said premises.

D. "Just compensation", as used in subsection C of this section, shall mean the value of the property taken, and in addition, any injury to any part of the property not taken. Any special and direct benefits to the part of the property not taken may be offset only against any injury to the property not taken. If only a part of a tract is taken, just compensation shall be ascertained by determining the difference between the fair market value of the whole tract immediately before the taking and the fair market value of that portion left remaining immediately after the taking.